U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 505
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

MAILED: 1/5/2001

IN THE MATTER OF:	*	
	*	
Jeremiah Brunson	*	BRB No.: 98-1064
Claimant	*	
	*	Case No.: 1997-LHC-0144
v.	*	
	*	OWCP No.: 16-161199
Ryan Walsh, Inc.	*	
Employer/Self-Insurer	*	

APPEARANCES:

Edward E. Boshears, Esq.
For the Claimant

Shari S. Miltiades, Esq.
For the Employer/Self-Insurer

BEFORE: DAVID W. DI NARDI
Administrative Law Judge

DECISION AND ORDER ON REMAND - DENYING BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on June 16, 1997 in Savannah, Georgia, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

PROCEDURAL HISTORY

Administrative Law Judge Edward J. Murty, Jr., by **Decision and Order** issued on March 5, 1998, concluded that Jeremiah Brunson ("Claimant" herein), had sustained a work-related traumatic injury on July 20, 1994 while working as a stevedore for Ryan-Walsh Stevedoring, Inc. ("Employer") on the waterfront in Brunswick, Georgia, and that Claimant "was clearly aware on July 20, 1994 that he had suffered a work-related injury." Judge Murty denied the claim because (1) the injury had resulted in no disability, (2) he "would be unable to return to the waterfront for this reason (**i.e.**, he testified positive for illicit drug use on three occasions "and was permanently suspended as a longshoreman") even had he sustained no injury whatsoever" and (3) his back and heart problems were not caused by his July 20, 1994 injury. Claimant timely requested consideration of the denial of his claim for benefits and the motion was also denied by Judge Murty.

Claimant timely filed an appeal with the Board and the Board, by **Decision and Order** issued on April 20, 1999, "agree(d) with Claimant that the Administrative Law Judge erred by failing to consider whether Claimant was entitled to invocation of the Section 20(a) presumption of causation" with reference to Claimant's left shoulder and cardiac problems, the Board concluding, "thus the Claimant is entitled, as a matter of law to invocation of the Section 20(a) presumption that his shoulder and heart conditions are causally related to his employment (footnote omitted). **See, e.g., Frye v. Potomac Electric Power Co.**, 21 BRBS 194, 196 (1988)." Accordingly, the Board remanded the matter to the Office of Administrative Law Judges for a reconsideration of the evidence to determine "whether the Employer has established rebuttal of the Section 20(a) presumption with regard to Claimant's shoulder injury and heart condition" and, if not, the Judge "must then consider the nature and extent of Claimant's disability." **Brunson, Sl. Op.**, pp. 3-4.

The Findings of Fact and Conclusions of Law made by Judge Murty, to the extent not disturbed by the Board, are binding upon the parties as the "Law of the Case," are incorporated herein by reference as if stated **in extenso** and will be reiterated herein solely for purposes of clarity and to deal with the Board's mandate.

As Judge Murty has retired, the matter was assigned to this Administrative Law Judge and the parties were so advised by **ORDER** issued on October 18, 2000. (ALJ EX A) Claimant waived his right to a hearing and he submitted supplemental evidence in the form of medical bills (CX A) and various documents already in this record. (CX B) Claimant's brief on remand was filed on December 21, 1999 (CX C) and Employer's reply brief (EX 1) was filed on November 24, 2000. Claimant's response brief (CX D) was filed on December 11, 2000. Claimant also filed supplemental material on December 21, 2000 previously submitted at his hearing (CX E), at which time the record was closed. (ALJ EX B) The matter is now ready for resolution.

Summary of the Evidence

Claimant testified that on July 20, 1994 he was struck in the buttocks by a forklift. He hit his elbows, knees and chest in front. He testified that he stopped working after the accident and received medical treatment on the date of the accident. He drove himself to Glynn Immediate Care where he was given medication and x-rayed. He was also given a drug screen, pursuant to his ILA contract, and he screened positive for cocaine and marijuana. (TR 24-25) He returned to work the following day, July 21, 1994, for Cooper/T.Smith, another stevedoring company. (TR 48) He testified that no light duty work is available for longshoremen. He testified that on July 21, 1994, he was driving vehicles off a roll-on/roll-off ship when he was involved in another accident. Claimant claimed he blacked out. This testimony was contradicted by Mr. Hogan. (TR 27, 49) Following this accident, the Claimant underwent a drug screen, and again screened positive for cocaine and marijuana. On July 22, 1994, the Claimant admitted himself to Charter Hospital for drug treatment. The Claimant denied using drugs on either date. This testimony was contradicted by his admission reports from Charter Hospital. Since this accident, the Claimant failed another random drug screen in 1996 and has therefore been permanently barred from the union. He has made no effort to be reinstated. (TR 45-46)

Claimant testified that following the release from Charter Hospital, he had some pain, but it was not severe pain. During the time he was undergoing treatment at Charter, he experienced an episode of congestive heart failure and was hospitalized at Southeast Georgia Regional Medical Center. He did testify,

however, that in August and September of 1994 he did not believe he would be able to return to work as a longshoreman, and when his pain worsened in November, 1994, he did not think he would be able to work. This is contradicted by his interrogatory answers and by his decision to not seek any benefits until January, 1995. In addition, the disability claim he made in 1994 after his discharge from Charter expressly excluded a job inquiry. (TR 30-31)

Claimant testified that he complained about his back and shoulder pain to Dr. Martinez, his cardiologist. However, this testimony is contradicted by Dr. Martinez's notes and testimony. Claimant also testified that he contacted someone at Ryan Walsh for medical treatment but could not be specific as to whom or where he called. This testimony was contradicted by Stan Henslee. Claimant also testified that he experienced pain in his hip and back, and that the pain prohibits him from doing longshore work because there is no light duty work. He acknowledged, however, that his disability claim is a result of his other medical problems and not these orthopedic/neurological symptoms. (TR 35-36)

Claimant acknowledged that on the date of the accident, he drove himself to Glynn Immediate Care, was released and worked the following day for Cooper/T.Smith. He drove vehicles off of a ship, including stick shift and automatic vehicles. He worked a full day as his auto accident did not occur until the end of the shift. (TR 49)

Claimant further testified that on July 22, 1994, the day after is Cooper/T.Smith accident, he did not even try to work. (TR 55):

> "Q: You didn't try to go to work because you knew they wouldn't let you work.
>
> A: Of course. I knew they wouldn't let me work...
>
> Q: And, because you tested positive to drugs.
>
> A: Yes, ma'am. I know that. So why would I go back down there trying to work and I knew I wasn't going to be able to work?"

Claimant denied being convicted of any drug-related offenses, and could not recall being incarcerated as recently as

1993. (TR 55-56) However, introduced into evidence were certified copies of his criminal convictions for possession of cocain on July 8, 1992 (RX 9-4); for violation of Florida drug abuse laws in 1983 (RX 9-10); and for violation of his probation in December, 1992 (RX 9-6, 9-7). These documents contradicted his testimony.

William James Hogan, stevedore for Cooper/T.Smith, is responsible for working with the longshoremen in the loading and unloading of ships. Claimant worked for Mr. Hogan unloading Hyundai cars on July 21, 1994. Claimant began working at 8:00 a.m. Mr. Hogan supervised and observed the entire operation, including observing Claimant at work. Claimant made no complaints to Mr. Hogan, did not mention an accident the previous day and required no special treatment as he performed his work. Regardless of the physical requirements of the work that day, Mr. Hogan testified that Claimant could not have worked as he did if he had any restrictions. Mr. Hogan testified that approximately 997 cars were unloaded. Late in the afternoon, heavy rains left standing water. Mr. Hogan observed that Claimant swerved to miss standing water and drove his vehicle into a ditch. Mr. Hogan testified that Claimant was sent for a drug test, which he failed. He attempted to work for Cooper/T.Smith the following day and was refused employment. In addition, Mr. Hogan observed that the police found a plastic bag of white powder under the driver's seat of the vehicle that Claimant crashed. Mr. Hogan also testified that the mat that Mr. Brunson was rolling was not heavy unless the entire mat was rolled up. He likened it to rolling up a rug. (TR 60-65)

Stan Henslee, who was formerly responsible for claims at Ryan Walsh, is now Vice-President of Claims for Homeport Insurance Company. Mr. Henslee testified as to Ryan Walsh's activity on this claim and introduced into evidence the Claimant's file. (RX 12) Mr. Henslee testified that he personally began handling the file in late 1994 or early 1995. He testified that at the time of injury, medical treatment was authorized with Glynn Immediate Care. The medicals were paid because at the time of treatment, the Employer was unaware of the positive drug screen and the Employer felt obligated to pay for the medical treatment. (TR 73)

An LS-202, First Report of Injury, was filed on July 27, 1994 and received by the OWCP, U.S. Department of Labor, on August 1, 1994. An acknowledgment from the U.S. Department of Labor, was post-marked August 24, 1994. Mr. Henslee testified

that his file reflected no request by the Claimant for additional medical treatment. There is absolutely no record of any communication between Claimant and any of Employer's claims' offices. (TR 71-73; RX 12)

The first activity following the injury was when the Claimant's attorney, Mr. Boshears, wrote a letter to Mr. Henslee dated May 2, 1995 and Mr. Henslee responded on May 17, 1995 with a copy of the LS-202. On June 5, 1995, Mr. Boshears wrote another letter contending that an LS-203 was being filed. There was no accompanying letter to the U.S. Department of Labor and there was no evidence that the LS-203 was actually enclosed with the letter of June 5, 1995. In response to Mr. Boshears' letter, Mr. Henslee called the U.S. Department of Labor on June 26, 1995 and learned that no claim in any form had been filed. Mr. Henslee called the U.S. Department of Labor again on November 7, 1995, and was again advised that no claim for injury had been filed by or on behalf of Claimant. (TR 75-76; RX 12 at 3, 5 6)

Mr. Henslee did receive correspondence from the Department of Labor, dated November 14, 1995, indicating that no claim had been filed. On February 19, 1996, Mr. Henslee received a copy of an LS-203, Notice of Claim, from the U.S. Department of Labor which showed a stamped filing date of December 7, 1995. In response, Mr. Henslee filed a Notice to Controvert on February 21, 1996. (TR 77-78; RX 12 at 3, 4)

Mr. Henslee testified that the next request for medical treatment from Claimant was made in June of 1996, when authorization was sought for treatment by a chiropractor. (TR 78; RX 12 at 3)

Mr. Henslee testified that when Mr. Boshears first communicated with him seeking medical treatment, Mr. Henslee thought the medical treatment being sought was for the Charter-By-The-Sea records that had been submitted for congestive heart failure. In addition, Claimant's only complaint at the time of the accident was for shoulder pain. He never made complaints of back or neck pain. Mr. Henslee found no correlation to the requests for treatment in 1995 and 1996 and a minor accident that occurred a year earlier in 1994 and involved no lost time.

Steven Zadach, the President of the Georgia Stevedore Association (GSA), testified that GSA enforces the union contract between the ILA and the maritime employers, that a drug

policy governing longshore workers went into effect on December 1, 1990, that under the terms of that policy, longshore workers are subject to be tested for drugs when accidents occur or property damage occurs and that that drug policy was initiated because "it was recognized by both parties that drugs and alcohol abuse had become a very big problem in the industry and both sides recognized that something had to be done to control it." A procedure is in place and when a drug test is requested, a urine test is performed. If a test is positive, an employee is suspended for ninety (90) days. The employee is then permitted to return to work, but is subject to random testing. In the event a longshore worker fails a second drug test, the employee is permanently suspended from the industry. (RX 6 at 5-8, 9)

Mr. Zadach testified, and tendered as an exhibit to his deposition, a drug test verifying that Claimant tested positive for cocaine and marijuana on July 20, 1994. Mr. Zadach's file also included evidence of a second positive drug screen on July 21, 1994, following the Cooper/T.Smith accident. As a result of those tests, Mr. Zadach immediately contacted Thomas Holland, the President of the ILA in Brunswick, advising him of Claimant's suspension effective July 23, 1994. The drug policy does provide for a retest, which Claimant never requested. Mr. Zadach testified that since the 1994 suspension, he is unaware of any effort by Claimant to return to work. On January 9, 1995, Mr. Zadach asked Claimant to appear for a random drug test. However, he did not appear for a drug test at that time. He was again requested to give a random drug test on February 2, 1996 and he tested positive again for cocaine and marijuana and therefore has been permanently suspended from employment as a longshoreman effective February 2, 1996. He has made no attempt to be reinstated as a longshoreman. Mr. Zadach testified that Mr. Brunson has in fact retired from the industry effective January, 1997. (RX 6 at 12-15; Deposition Exhibit 2)

Other non-medical evidence consisted of Claimant's responses to interrogatories. In his interrogatory responses, the Claimant stated that his back and legs did not start to hurt until six months after the July 20, 1994 accident, which is why he was only seeking benefits effective January 1, 1995. This conflicts directly with the Claimant's testimony that he felt he was having problems by August, 1994. In his interrogatory answers, he acknowledges a conviction for possession of drugs, which was also in conflict with his hearing testimony. In response #20, he claims that he was not aware he had a claim

until January, 1995. This is also inconsistent with his hearing testimony. (RX 13 at 7-10)

Medical evidence was introduced in the form of both medical reports and medical depositions and these will be summarized at this point.

Glynn Immediate Care. On July 20, 1994, Claimant was treated at Glynn Immediate Care. He complained only of pain to his left shoulder. He also reported that he was out of blood pressure medicine and he was given a prescription for Procardia, apparently based on his previous chart. I note that his chart showed previous visits to Glynn Immediate Care on January 22, 1993, when he was treated for high blood pressure and prescribed Procardia. On October 3, 1992, he was treated for a hand injury, but was also prescribed Procardia. On September 30, 1992, he was treated for a fractured right hand and on March 21, 1992, he was treated for a finger injury, but was noted to have high blood pressure and was also prescribed Procardia. Claimant was apparently written prescriptions for Procardia on virtually every visit to Glynn Immediate Care, regardless of the purpose for the visit. Mr. Brunson's visit to Glynn Immediate Care on July 20, 1994 specifically excludes any mention of neck or back pain. (RX 1 at 1-6)

Dr. Robert H. Thompson. Long before his treatment at Glynn Immediate Care, Claimant was a patient of Dr. Thompson, an internist in Brunswick. Dr. Thompson testified that his first documented treatment of Claimant was in April, 1983, although there could have been previous treatment since Dr. Thompson has purged some of his records. That treatment was for a strain of his right foot and left wrist, a job injury that had occurred with Palmetto Street Company. Claimant was injured when he loaded soybean bags onto a barge. Dr. Thompson not only treated the job injury, but also was treating him for other medical problems in 1983. His report of April 4, 1983 reflects medication including Indocin, which is an anti-inflammatory, prescriptions for Dyazide and Lopressor, in April, 1993. These are medications for high blood pressure. Claimant was released to return to work because of the April 4, 1983 foot injury on May 9, 1983. (RX 2 at 2-7, RX 10 at 9-11)

Claimant returned to Dr. Thompson in May, 1985, again as the result of a job injury, but also seeking treatment for high blood pressure. His blood pressure at that time seemed to be

"moderately controlled," according to Dr. Thompson. Dr. Thompson did not know what treatment Claimant received between 1983 and 1985. The blood pressure medication prescribed in 1985 included Dyazide. He was also prescribed Clinoril, an anti-inflammatory, and Tenormin, a beta blocker used for hypertension. On May 14, 1985, Claimant was hospitalized. His admitting diagnosis, according to Dr. Thompson, was high blood pressure. Follow-up treatment in 1985 continued through approximately May 24, 1985. Prescriptions included Dyazide, Tenormin, Clinoril and Indocin. (RX 2 at 13-15, RX 10 at 10-13)

Claimant did not return to Dr. Thompson until December, 1988, at which time he presented for an eye infection, but continued follow-up treatment for high blood pressure and was prescribed Procardia. Dr. Thompson testified that he did not know whether Claimant was seen by any other physician during that three-year gap. He was not seen by Dr. Thompson again until 1992. At the time, his blood pressure was elevated at 200/130. Dr. Thompson continued to treat the elevated blood pressure with Procardia. (RX 2 at 16, RX 10 at 14-15)

Dr. Thompson was also concerned about the Claimant's sleep apnea, a condition caused by a nasal obstruction. Patients who are diagnosed with sleep apnea are encouraged not to use any drug of any kind, including alcohol, due to the sedative effect thereof. Dr. Thompson testified that his next visit with Claimant was not until 1996, although in the interim, Dr. Thompson learned that Claimant was under treatment with Dr. Enrique Martinez, a cardiologist. Dr. Martinez was treating conditions including hypertension, congestive heart failure and acute pulmonary edema. (RX 10 at 17-18, 21)

On December 23, 1996, Claimant presented to Dr. Thompson on multiple medications including heart and high blood pressure medicine. Claimant was complaining of severe right upper quadrant pain that had begun the previous day after partying. No mention was made of any back, shoulder or neck pain or of anything having to do with any injury. He reported to Dr. Thompson that he had been at a party the previous Saturday night, and that he had been smoking and drinking. Dr. Thompson hospitalized him and diagnosed diverticulitis and Claimant did not relate this treatment to any injuries or trauma, and Dr. Thompson specifically asked him about injuries. (RX 10 at 23-28)

Dr. Thompson testified that at no time during his treatment

did Claimant relate that he had been involved in an accident in 1994. At no time did he mention his injury to Dr. Thompson. At no time did he make any complaints of neck or back pain. On December 23, 1996, Dr. Thompson signed an Examining Physician's Statement wherein the doctor attributed Claimant's disability to acute abdominal pain, diverticulitis, alcoholism, smoke abuse, hypertension, diabetes and cardiomyopathy. Again there is no mention of any job injury. Dr. Thompson also testified that he could not relate any of the symptoms that he has treated since 1994, including hypertension, pulmonary edema and sleep apnea, to the accident of July 20, 1994. Dr. Thompson, who pointed out that he did not treat Claimant in 1994, opined that the problems that he treated were not related to the bump by the forklift. (RX 10 at 33-41, RX 2 at 1)

Charter Hospital. Other pertinent medical evidence includes the records from Charter-By-The-Sea, where the Claimant admitted himself on July 22, 1994. At the time of his admission, the Claimant reported to his physician prolonged daily and frequent use of alcohol, marijuana and cocaine. At the time of his admission on July 22, 1994, he was mildly intoxicated. He admitted to the physician that he smoked two marijuana cigarettes on the day of his admission to Charter, and had last used cocaine two days earlier, which would have been the date of injury. This conflicts with Claimant's hearing testimony. Also at the time of his admission, he was noted to have hypertension, and pain in his feet from arthritis. While the admission history and physical examination report did reference his July 20, 1994 injury, arm and shoulder pain, his physical examination was normal, specifically the examination of his extremities and his neurological exam. His admission diagnoses make no reference to his arm and shoulder symptoms. (RX 3 at 17-20)

After approximately two days in Charter-By-The-Sea, the Claimant was transferred to Southeast Georgia Regional Medical Center (SEGRMC) when he developed respiratory distress and congestive heart failure. He was re-admitted to Charter on August 1, 1994 and he was discharged again on August 19, 1994. During this SEGRMC hospitalization, Dr. Martinez noted that Claimant was not following his diet, and was poorly compliant. He also continued to smoke. He was discharged from Charter-By-The-Sea on medications including Hydrochlorothiazide, Lotesin, Calan, and Procardia. He was urged to attend AA dnd NA meetings, and to follow-up with Dr. Martinez. It is noteworthy that even when he was re-admitted to Charter on August 1, 1994

after his SEGRMC hospitalization, he still tested positive for marijuana. (RX 3 at 15-16)

Dr. Enrique Martinez. Much of the Claimant's medical treatment since 1993 has been rendered by Dr. Enrique Martinez, a Board Certified cardiologist in Brunswick. Dr. Martinez, Claimant's current and primary physician, first treated him in June, 1993 when he was admitted to SEGRMC for severe hypertension and congestive heart failure. At the time of this hospital admission, his blood pressure was 239/113 and his symptoms included shortness of breath, swelling of his legs and extreme fatigue. Claimant was advised to stay off work, not smoke or drink alcohol. He was discharged on a diabetic diet and on medication including aspirin, Magnesium Chloride, Zyloprim, Lanoxin, Capoten and Norvasc, all for his heart condition and high blood pressure. According to the hospital reports, at the time of admission, Claimant had a two-year history of hypertension, but had not taken medicine despite professional advice to do so. (RX 4 at 1-5, RX 11 at 7-8)

Dr. Martinez described congestive heart failure as a "state in which the heart is unable to contract and relax properly, producing the accumulation of fluid in his lungs, primarily causing what we call pulmonary edema." Dr. Martinez testified that when the symptoms last more than a few days, swelling of the lower extremities occurs, a condition which did not happen in 1994. Claimant's complaints were primarily of shortness of breath and coughing. (RX 11 at 8) Dr. Martinez noted that Claimant has a long history of non-compliance with his recommended course of treatment and at the time of the 1993 hospitalization, he had been ill for at least two years and not taking medication. (**Id.** at 9)

Dr. Martinez also testified that congestive heart failure can be caused by multiple conditions. In Claimant's case, he attributed it to uncontrolled high blood pressure. Diabetes could have been a contributor, the doctor concluding that Claimant's cigarette smoking did not help his condition. (RX 11 at 10-11)

During his 1993 hospitalization, it is noteworthy that Claimant was observed smoking in the hospital bathroom on June 12, 1993. (RX 4 at 35, 46)

Claimant's older hospital reports show several documented

incidents of high blood pressure. He was treated in the emergency room on April 23, 1988 for a severe laceration. He was intoxicated and his blood pressure was 190/144. He was treated in the emergency room on March 19, 1988. His blood pressure was 160/110. He had been driving while intoxicated. (RX 4 at 71)

Dr. Martinez testified that he followed Claimant in his office following the 1993 hospitalization, and rendered him disabled from work. According to Dr. Martinez, "I don't remember him being a model of compliance, keeping appointments, following instructions, no. He has not done that." In many of the approximately 83 pages of office notes that have been generated since 1993, Dr. Martinez made reference to the fact that Claimant was still smoking (RX 5-83), was not taking his medication (RX 5-82), and also failed to show for appointments. (RX 5-80) He continued to drink alcohol. (RX 5-79) He expressed an interest in returning to work in September, 1993 (RX 5-76, but Dr. Martinez would not release him to work and he remained disabled until late 1993. He was asked by Dr. Martinez to regularly monitor his blood pressure, which he did not always do. (RX 5-67)

Dr. Martinez testified, and his records reflect, that he permitted Claimant to return to work following an office visit on or about December 6, 1993. He was urged to quit smoking and quit drinking and was told to return to the office in one week. Claimant failed to show for appointments with Dr. Martinez on December 6, 1993 and on January 31, 1994. In fact, he did not return to Dr. Martinez's office until after his discharge from Charter. Even while he was permitted to return to work, he was noted to be drinking, not taking his medication and smoking. Dr. Martinez tried to encourage him to get off his noxious substances, and get on his medication and control his diet, but Claimant was not compliant. (RX 5 at 60, RX 11 at 11-13)

When first seen in follow-up with Dr. Martinez following the 1994 hospitalization at Charter, Claimant's blood pressure was extremely high, 240/120. Most noteworthy is the fact that the office notes for August, 1994 make absolutely no reference to any job injury. (RX 5-55 to RX 5-58) To the contrary, however, they make reference to cocaine use, to non-compliance with diet, and to the patient's knowledge that he needs to change his lifestyle. In fact, Dr. Martinez's medical reports from August, 1994 through August 29, 1996 make absolutely no reference to any job injury. The Claimant was seen more than 50 times during

this interval. He did complain about other medical problems including respiratory infections and dysfunction, but there is no mention of any back, neck, shoulder or leg pain. On August 28, 1996, Dr. Martinez specifically reported that Claimant's forklift accident "is highly unlikely to cause heart failure." (RX 5 at 55-58)

Dr. Martinez elaborated on his opinions in his deposition where he testified forthrightly that the most likely causes for the heart failure are "high blood pressure, diabetes control, smoking and others," and the doctor refused to provide a letter in support of Claimant's compensation claim. Dr. Martinez also testified that he did not recall any other discussions about any injury on the job before August 28, 1996 and he testified "I have always told him, Jeremiah, this is not produced by trauma. This is produced by other illnesses you have to face." (RX 11 at 23-26)

Dr. Martinez testified that Claimant was unable to work in 1994 because of his diabetes and uncontrolled high blood pressure. Dr. Martinez also testified that the blood pressure reading recorded at Glynn Immediate Care on July 20, 1994 was not related in any way to the forklift accident. Dr. Martinez also authored a social security disability report dated May 18, 1995, in which he based Claimant's disability on "severe hypertension, congestive heart failure, alcoholism and drug addiction. In no way do I mention the shoulder or back problems as part of or aggravating or causing or producing." Dr. Martinez noted that if the complaints of shoulder and back pain had been of any significance, he would have referred Claimant to an orthopedic surgeon. (RX 11 at 23-27, 32)

Dr. Martinez again specifically testified that in Claimant's case, an episode of intense, severe pain, resulting from a traumatic injury, did not cause his congestive heart failure.

This closed record also contains the transcripts of the deposition testimony of Dr. Wilbur Brown, a chiropractor, and Dr. Steven Pappas, a neurologist. Dr. Brown, who does not have a medical degree, testified that his opinion as to Claimant's disability was based solely on Claimant's subjective complaints and on no other information. Dr. Brown testified that his opinion could change if different facts were brought to his attention and, most important, Dr. Brown knew nothing about the reasons that Claimant stopped working. (RX 14 at 19-22)

Dr. Pappas, a neurologist, testified that he examined Claimant and had an MRI performed. The history given to Dr. Pappas was persistent shoulder, low back and hip pain. Dr. Pappas, who based his opinions on what the Claimant told him, testified that the MRI scan that was performed showed some degenerative disc disease. The findings on the MRI, however, were not indicative of any trauma. Dr. Pappas testified that if Claimant's condition did result from trauma, he would have expected the pain to develop within days or possibly weeks of a trauma and it would be highly unusual for the pain to develop six months or one year after trauma. (RX 15 at 5-9, 15, 16)

On the basis of the totality of this record and having in mind the credibility determinations of Judge Murty who heard the testimony and observed the demeanor of this less-than-candid Claimant, I make the following:

Additional Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction,**

Inc., 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v.**

Bath Iron Works Corp., 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer's burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises, held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22

(CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm and when it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer.

33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing

all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his left shoulder and heart condition, resulted from his July 20, 1994 injury at the Employer's maritime facility.

As noted above, the Board held on page 3 of its decision herein as follows:

"Thus, Claimant is entitled as a matter of law to invocation of the Section 20(a) presumption that his shoulder and heart

conditions are causally related to his employment. (footnote omitted.) **See, e.g., Frye v. Potomac Electric Co.**, 21 BRBS 194, 196 (1988)."

Thus, as Claimant has invoked the Section 20(a) presumption, I must now consider whether the Employer has established rebuttal of the Section 20(a) presumption with regard to Claimant's shoulder injury and heart condition. As discussed further below in the next section, the Employer has produced substantial evidence severing the connection between Claimant's bodily harm and his maritime employment. Thus, the presumption falls out of the case, does not control the result and I shall now weigh and evaluate all of the record evidence in light of the Board's clear mandate to the Office of Administrative Law Judges.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics**

Corp., 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

As also noted above, the Law of the Case is that Claimant, as a matter of law, has invoked the Section 20(a) presumption with reference to his left shoulder and heart conditions, that the Employer had timely notice of the July 20, 1994 work-related incident and that the Claimant timely filed for benefits once a dispute arose between the parties.

I shall now discuss the substantial medical evidence offered by the Employer, which evidence I find and conclude rebuts the Section 20(a) statutory presumption.

At the outset I note that the claim filed herein by the Claimant must be, and the same, must be **DENIED** as there simply is no credible evidence that Claimant's relatively minor incident on July 20, 1994 has resulted in any economic disability to the Claimant as I find and conclude that Claimant's underlying and pre-existing hypertension and heart problems were neither aggravated nor accelerated nor exacerbated by that July 20, 1994 incident with the forklift.

Claimant has a history of filing numerous claims for accidents as a stevedore on the waterfront and he, of all employees, knows the procedures to be followed in reporting injuries and seeking benefits therefor. This record is replete with Claimant's inconsistent, contradictory, vague and evasive statements about what happened on July 20, 1994 and what bodily parts were affected, if any.

As also summarized above, Claimant has given inconsistent statements to the doctors treating him; he has given contradictory statements to the ILA in filing his applications for his union pension; he has also given contradictory

statements in his application for Social Security Administration disability benefits. While the Employer has stipulated to the occurrence of that relatively minor incident on July 20, 1994, Claimant must still establish that he has sustained economic disability therefrom.

Yes, Claimant was involved in an incident on July 20, 1994, but his history report to on-duty personnel at Glynn Immediate Care was limited to his shoulder and he was released to return to work without any restrictions and returned to work the following day for another stevedoring employer. It was the Claimant's own testimony that no light duty is available for longshoremen, therefore he was able to work without restrictions. His employer the following day, Mr. Hogan, testified that Claimant helped drive 995 motor vehicles off a roll-on/roll-off ship. He never complained of any physical problems, he never asked for any limited work, and he never mentioned any accident or any problems resulting from an accident. Claimant discontinued work on July 22, 1994 for reasons having nothing to do with the July 20, 1994 incident. Rather, Claimant discontinued working on July 22, 1994 because had tested positive for cocaine on two consecutive days and was prohibited from working by Mr. Hogan's company and by the union. Claimant, according to Steven Zadach, was under a 90-day suspension due to his drug use and was not eligible for any work as a longshoreman. There is absolutely no evidence of any disability resulting from the bump by the forklift, an incident which produced complaints only of shoulder pain on one day. Clearly the evidence establishes that had it not been for the drug use, Claimant would have continued to work. Even Claimant testified that he did not try to go to work because he knew that he was under suspension and could not work on the docks.

Even if it is concluded that the Section 20(a) presumption has not been rebutted, ample evidence, particularly medical evidence, establishes that Claimant has sustained no disability resulting from this accident.

The Claimant cannot establish by a preponderance of the evidence that any disability is causally related to his job. **Director, OWCP v. Greenwich Colleries/Maher Terminals**, **supra**.

With respect to the left shoulder injury, the medical evidence shows treatment only on the date of injury. Beyond the Claimant's self-serving, exaggerated and incredible testimony,

there is no evidence that he sought treatment, or even complained to a doctor about his shoulder, until he talked to Dr. Martinez nearly two years later seeking a disability letter and asked for permission to see a chiropractor. The Employer's record of all conversations concerning this claim was placed into evidence, and the testimony of Stan Henslee conclusively established that there was no communication from Claimant or anyone acting on behalf of the Claimant until May, 1995, nearly one year after the accident. At the time of the initial incident, the complaint was only of shoulder pain. Claimant testified that the remaining pain did not start for several months, which suggests to this Administrative Law Judge that it could not possibly have been related to the July 20, 1994 accident. Dr. Steven Pappas, a Board Certified neurologist who has recently treated the Claimant, has performed diagnostic studied which establish the existence of a long-standing degenerative condition that is not the result of trauma. Had trauma aggravated, accelerated or exacerbated the underlying degenerative condition, Dr. Pappas testified that the Claimant would have been symptomatic much earlier, and I agree with the doctor on that point.

Moreover, the opinions of Dr. Brown, a chiropractor, are given little or no weight herein because the doctor's opinions are based solely on Claimant's exaggerated and incredible subjective complaints. Furthermore, the doctor did not have access to other medical reports, and he conceded that an accurate history report might cause him to change his opinions.

With regard to the cardiovascular condition, there is ample evidence that the Claimant's condition was not caused, accelerated, exacerbated or aggravated by his 1994 accident, and I so find and conclude.

The most persuasive evidence comes from the testimony of Dr. Enrique Martinez, a Board Certified cardiologist who has been Claimant's primary treating physician since 1993. Dr. Martinez testified most forthrightly that there was no connection between Claimant's work and his congestive heart failure. Even if Claimant's blood pressure was slightly elevated on the date of injury, Dr. Martinez was of the opinion that this has no bearing on the causal relationship to work, particularly in light of Claimant's long history of uncontrolled high blood pressure. Dr. Martinez related Claimant's problems to continued drinking, continued smoking, continued drug abuse, uncontrolled high blood

pressure, poor diet and many other personal, non-work related conditions, which is reflected in his reports and his deposition testimony. He expressly excluded Claimant's work as a cause of his disability in any way. There was absolutely no credible or persuasive evidence from the Claimant or any other source that the work performed by Claimant or the conditions in which he worked were so demanding or stressful as to create this problem or to contribute, in any way, to his heart condition.

Clearly, Dr. Martinez is the expert on whether a relationship exists, and since he has eliminated any relationship, I accept the doctor's opinion on the lack of any causal relationship whatsoever between Claimant's relatively minor work injury and his current condition.

This closed record leads ineluctably to the conclusion that any disability Claimant has experienced on and after January 1, 1995 is due solely to his intentional and unexcused misconduct. Clearly, Claimant's drug abuse, his failure to comply with medical treatment as recommended by Dr. Martinez over a several year period, his continued smoking and drinking and his refusal to control either his smoking or his diet while hospitalized for medical problems, and his life style graphically establish that the Claimant has exercised no regard for his own welfare.

It is undisputed that the Claimant was able to work the day after the accident, and would have continued working had he not tested positive for cocaine and marijuana, by his own admission. His disability designation from Dr. Martinez is based on medical problems resulting from a history of high blood pressure and other personal, lifestyle factors, and had nothing to do with anything that occurred on the job, as there is no credible evidence that these pre-existing conditions were aggravated, accelerated or exacerbated by the July 20, 1994 incident. His complaints of neck and back pain did not surface until long after the July 20, 1994 incident. His cardiologist, Dr. Martinez, has specifically excluded this incident as a causative factor in his cardiovascular problems. His neurologist, Dr. Pappas, has excluded the accident from any orthopedic or neurological problems he may be experiencing. For all of these reasons, the disability claim must be denied, and I so find and conclude.

As noted above, it is well established that, in arriving in his decision, this Administrative Law Judge is entitled to evaluate the credibility of all witnesses and to draw his own

inferences and conclusions from the evidence. **Calbeck v. Strachan Shipping Co.**, 306 F.2d 693 (5th Cir. 1962). Among other things, the Claimant's credibility has been called into question in situations such as this, where the Claimant has denied felony convictions. **Haynes v. National Steel and Shipbuilding Co.**, 29 BRBS 470 (ALJ 1995).

Claimant's testimony is full of inconsistencies and he is simply not a credible witness. Judge Murty so found and I agree.

With regard to the date of injury, the Claimant testified that he was run over by a forklift. The testimony of his eyewitness, Mr. Moore, however, was that the forklift stopped before it ran over the Claimant. Mr. Moore gave very inconsistent testimony about what he saw, even though he was standing approximately 25 feet from the Claimant. It is undisputed that at the time of the accident, Claimant declined to be transported by an ambulance. Rather, he drove himself to Glynn Immediate Care where he was rendered medical treatment.

Moreover, Claimant performed unrestricted work the following day for Cooper/T.Smith driving both stick shift and automatic vehicles off of a ship and worked an entire day before being involved in another automobile accident, again apparently while under the influence of a controlled substance, an accident that resulted in Claimant's becoming dizzy and blacking out. Another witness, James Hogan, testified that Claimant was attempting to avoid standing water and drove his vehicle into a ditch. While Claimant denied having used drugs on either this day or the previous day, he tested positive for cocaine and marijuana on both days. In addition, Mr. Hogan observed a white powdered substance in the vehicle that Claimant crashed. Claimant was not doing light duty work, experienced no medical problems, made no complaints and reported no previous accidents while working for Cooper/T.Smith. These facts conclusively establish that he was not disabled as a result of the incident on July 20, 1994. Mr. Hogan testified that Claimant tried to work the following day for Cooper/T.Smith, but was declined employment because of the illegal drug use. Claimant candidly admitted that he did not try to work the following day because he knew he would be refused work due to his drug test and that he admitted himself to Charter Hospital for drug detoxification. He admitted using drugs immediately before his admission. While a patient at

Charter, he suffered an episode of congestive heart failure, a condition triggered by his personal lifestyle.

Claimant alleges that following his discharge from the hospital, he complained to Ryan Walsh and asked for medical treatment; however, Stan Henslee testified and produced Ryan Walsh's file, which conclusively establishes that no such conversation took place. Claimant has a history of lost time claims with other employers, and acknowledges that he knows what he must do to report a job injury.

The totality of this closed record leads conclusively to the conclusion that medical evidence establishes that unrelated medical problems are the reason for his present disability. Even if he was not disabled from heart problems, he would still be barred from work due to drug use. The head of the Georgia Stevedore Association testified that Claimant has been permanently suspended from the union due to drug use, and Claimant has made no effort to appeal that permanent suspension. Dr. Martinez testified that Claimant was permanently disabled both before and since this date of accident as a result of cardiovascular problems and he specifically excluded any job accident. Claimant contended that he reported his complaints to Dr. Martinez, yet Dr. Martinez kept a very exhaustive record of his treatment with Claimant, and there was absolutely no mention of any back, neck or shoulder problems. Claimant agreed that his pain may not have started until six months after the accident in an obvious effort to avoid his statute of limitations problems, a claim which I find to be preposterous, especially as Dr. Pappas, the Board Certified neurologist, testified that it was medically highly improbable for the symptoms to remain asymptomatic for that length of time.

Claimant has exhibited behavior that establishes his lack of credibility. He used drugs and alcohol despite his denial. A review of the Charter records proves this. He continued to smoke and drink despite being told to quit by Dr. Martinez. His drug use continued well after this accident. In fact, previously in December of 1993, while allegedly disabled by Dr. Martinez for heart problems, he was arrested on a probation violation for possession of marijuana. The probation violation arose from an earlier felony conviction for drug possession, a conviction that was expressly denied by Claimant until confronted with the evidence thereof.

The only “evidence” supporting this claim is the incredible testimony of Claimant and I, like Judge Murty, have rejected his testimony as not credible.

Intervening Event

The issue in this case is whether any disability herein is casually related to, and is the natural and unavoidable consequence of, Claimant's work-related accident or whether the Claimant’s lifestyle constituted an independent and intervening event attributable to Claimant's own intentional conduct, thus breaking the chain of causality between the work-related injury and any disability he may now be experiencing.

The basic rule of law in "direct and natural consequences" cases is stated in Vol. 1 **Larson's Workmen's Compensation Law** §13.00 at 3-348.91 (1985):

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause [event] attributable to claimant's own intentional conduct.
>
> Professor Larson writes at Section 13.11:
>
> The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.
>
> The simplest application of this principle is the rule that all the medical consequences and natural sequelae that flow from the primary injury are compensable . . . The issue in all of these cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications. (**Id**. at §13.11(a))

This rule is succinctly stated in **Cyr v. Crescent Wharf & Warehouse**, 211 F.2d 454, 457 (9th Cir. 1954) as follows: "If an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the

two may be said to fuse into one compensable injury." **See also Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mississippi Coast Marine, Inc. v. Bosarge**, 632 F.2d 994 (5th Cir. 981), **modified**, 657 F.2d 665 (5th Cir. 1981); **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981).

Likewise, a state court has held: "We think that in this case the claimant has produced the requisite medical evidence sufficient to establish the causal connection between his present condition and the 1972 injury. The only medical evidence presented on the issue favors the Claimant." **Christensen v. State Accident Insurance Fund**, 27 Or. App. 595, 557 P.2d 48 (1976).

The case at bar is not a situation in which the initial medical condition itself progresses into complications more serious than the original injury, thus rendering the added complications compensable. **See Andras v. Donovan**, 414 F.2d 241 (5th Cir. 1969). Once the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable as long as the worsening is not shown to have been produced by an independent or non-industrial cause. **Hayward v. Parsons Hospital**, 32 A.2d 983, 301 N.Y.S.2d 649 (1960). Moreover, the subsequent disability is compensable even if the triggering episode is some non-employment exertion like raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances.

However, a different question is presented when the triggering activity is itself rash in the light of claimant's knowledge of his condition. The issue in all such cases is exclusively the medical issue of causal connection between the primary injury and the subsequent medical complications, and denials of compensation in this category have invariably been the result of a conclusion that the requisite medical causal connection did not exist. **Matherly v. State Accident Insurance Fund**, 28 Or. App. 691, 560 P.2d 682 (1977). The case at bar does not involve a situation in which a weakened body member contributed to a later fall or other injury. **See Leonard v. Arnold**, 218 Va. 210, 237 S.E.2d 97 (1977). A weakened member was held to have caused the subsequent compensable injury where there was no evidence of negligence or fault. **J.V. Vozzolo,**

Inc. v. Britton, 377 F. 2d 144 (D.C. Cir. 1967); **Carabetta v. Industrial Commission**, 12 Ariz. App. 239, 469 P.2d 473 (1970). However, the subsequent consequences are not compensable when the claimant's negligent intentional act broke the chain of causation. **Sullivan v. B & A Construction, Inc.**, 122 N.Y.S.2d 571, 120 N.E.2d 694 (1954). If a claimant, knowing of certain weaknesses, rashly undertakes activities likely to produce harmful results, the chain of causation is broken by his own negligence. **Johnnie's Produce Co. v. Benedict & Jordan**, 120 So. 2d 12 (Fla. 1960). Nor is this a case involving a subsequent incident on the way to the doctor's office for treatment of the original work-related accident. **Fitzgibbons v. Clarke**, 205 Minn. 235, 285 N.W.2d 528 (1939); **Laines v. WCAB**, 40 Cal. Comp. Cases 365, 48 Cal. App. 3d 872 (1975). The visit to the doctor was based on the statutory obligation of the employer to furnish, and of the employee to submit to, a medical examination. **See Kearney v. Shattuck**, 12 A.D.2d 678, 207 N.Y.S.2d 722 (1960).

The Benefits Review Board reversed an award of benefits to a claimant who had sustained an injury to his left leg, when he fell from the roof of his house after his injured knee collapsed under him, while attempting to repair his television antenna. Eighteen months earlier this claimant had injured his right knee in a work-related accident, such claimant receiving benefits for his temporary total disability and for a rating of fifteen percent permanent partial disability of the leg. The Board reversed the award for additional compensation resulting from the second injury. **Grumbley v. Eastern Associated Terminals Co.**, 9 BRBS 650 (1979). The Benefits Review Board held, "[U]nder Section 2(2) of the Act, the second injury to be compensable must be related to the original injury. Therefore, if there is an intervening cause or event between the two injuries, the second injury is not compensable. Thus, this Administrative Law Judge must focus on whether the second injury resulted 'naturally or unavoidably.' Therefore, claimant's action must show a degree of due care in regard to his injury." Furthermore, the Board held, "[c]laimant obviously did not take any such precautions, nor did the record show that any emergency situation existed that would relieve claimant from such allegation." **Grumbley**, **supra**, at 652.

This Administrative Law Judge, applying these well-settled legal principles to the case at bar, and based upon the totality of the record, finds and concludes that Claimant's lifestyle for

many years, pre-injury and post-injury, was an intervening cause which is attributable only to Claimant's own intentional conduct and which broke the chain of causality between Claimant's relatively minor work-related incident and his present condition. Claimant's actions did not exhibit the requisite amount of due care in regard to his well-being, especially as he was released to return to work without any restrictions on July 20, 1994, from which I have already concluded and found that he had recovered. Nor does the record reveal the existence of an emergency situation which would relieve Claimant of the requirement of exercising due care. Accordingly, the Employer is not responsible for any disability or medical expenses relating to this alleged shoulder and cardiac problems as I find and conclude that any disability is due to his personal lifestyle and his deleterious habits, and that such is an independent and intervening event breaking the chain of causality between Claimant's relatively minor work-related injury and any disability he may now experience.

Accordingly, this Administrative Law Judge, after reviewing the totality of this closed record, finds and concludes that the claim before me shall be and the same hereby is **DENIED**.

Claimant was involved in a relatively minor incident on July 20, 1994 and his entire claim is based solely on his exaggerated and incredible testimony, and I so find and conclude.

As summarized extensively above, Claimant has given to his doctors erroneous reports about his social and employment history, particularly his lifestyle and his social life, and it is for that reason that I reject Dr. Brown's testimony.

My distinguished and now retired colleague, Judge Murty, who observed Claimant's demeanor and who found his testimony to be incredible, properly denied the claim for benefits and the Board's remand to the Office of Administrative Law Judges has given this Administrative Law Judge the opportunity to explicate, by these additional findings of fact, that which was implicit in Judge Murty's decision.

Claimant was involved in a relatively minor incident on July 20, 1994, received appropriate treatment at the Emergency Room, was released to return to work and, in fact, did return to physically-demanding work as a stevedore for another maritime employer, injured himself in another and more serious accident, again apparently under the influence of illicit drugs, and has now been permanently barred from waterfront work because he has failed three drug tests.

This closed record lends ineluctably to the conclusion that any disability that Claimant may now experience, including any left shoulder or cardiac problems, is due solely to his non-work related conditions and to his personal lifestyle, including illicit drug use, alcohol abuse, continued smoking, even while in the hospital as an in-patient, and his failure to abide by his doctors' advice.

There is no credible, probative or persuasive medical evidence from which I could infer that Claimant's left shoulder or cardiac problems directly resulted from or were aggravated, accelerated or exacerbated by the relatively minor incident on July 20, 1994, especially as he was able to engage in his physically-demanding duties on the very next day as a stevedore

for another firm, and he would still be working on the waterfront but for his permanent debarment.

ENTITLEMENT

Since Claimant's July 20, 1994 injury has not resulted in any disability and since there is no need for any medical treatment for his left shoulder or cardiac problems, he is not entitled to additional benefits in this proceeding and his claim for benefits is hereby **DENIED**. Since any disability Claimant now experiences is due to an independent, subsequent and intervening event, severing the chain of causality or connection between any such disability and his previous work-related injury, he is not entitled to benefits in this proceeding and his claim for benefits is hereby **DENIED**.

The rule that all doubts must be resolved in Claimant's favor does not require that this Administrative Law Judge always find for Claimant when there is a dispute or conflict in the testimony. It merely means that, if doubt about the proper resolution of conflicts remains in the Administrative Law Judge's mind, these doubts should be resolved in Claimant's favor. **Hodgson v. Kaiser Steel Corporation**, 11 BRBS 421 (1979). Furthermore, the mere existence of conflicting evidence does not, **ipso facto**, entitle a Claimant to a finding in his favor. **Lobin v. Early-Massman**, 11 BRBS 359 (1979).

While claimant correctly asserts that all doubtful fact questions are to be resolved in favor of the injured employee, the mere presence of conflicting evidence does not require a conclusion that there are doubts which must be resolved in claimant's favor. **See Hislop v. Marine Terminals Corp**., 14 BRBS 927 (1982). Rather, before applying the "true doubt" rule, the Benefits Review Board has held that this Administrative Law Judge should attempt to evaluate the conflicting evidence. **See Betz v. Arthur Snowden Co**., 14 BRBS 805 (1981). [Moreover, the U.S. Supreme Court has abolished the "true doubt" rule in **Maher Terminals, Inc. v. Director**, OWCP, 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994), aff'g 992 F.2d 1277, 27 BRBS 1 (CRT)(3d Cir. 1993)].

As Claimant has not successfully prosecuted this claim, his attorney is not entitled to a fee award.

ORDER

It is therefore **ORDERED** that the claim for compensation benefits filed by Jeremiah Brunson shall be, and the same is hereby **DENIED**.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:jl